VIRGINIA LAW REGISTER

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The Meeting of the Virginia Bar Association.

As stated in our August number, the Virginia State Bar Association was to meet on August 4th, 5th, and 6th at the Hot Springs. That meeting was duly held and was attended by 185 members. From a social standpoint it was probably one of the most brilliant meetings of the association, and the members, with their wives and daughters, will long have occasion to remember the event.

Sixty-four new members enrolled themselves, and there was a degree of enthusiasm among those who attended which augurs well for the continued prosperity of the association. The program was carried out as per schedule. The president's address, which took over two hours to read, was an able and well-conceived paper.

Judge (ex-senator) Lindsay's address, which also occupied a little over two hours the next day, supplemented to a certain extent Mr. Merideth's the one being upon "Interstate Commerce" and the other upon "The Man and the Corporation."

Both papers took strong grounds against further federal encroachment upon the state control of corporations and showed the absolute futility of many of the so-called remedies which the general government was urged to apply.

Hon. A. C. Gordon's paper on the "Legal Foundations of Socialism" was, as anticipated, a scholarly presentation in a novel way of many complex questions arising from laws which, in their result if not in their intention, were socialistic; and indicated in a most interesting way how narrow a boundary often separated socialism from paternal legislation. The paper is worthy of a wider audience.

Hon. Holmes Conrad's address on the "Old Virginia County Court" was, as might have been expected, an eloquent and enter-

taining paper. Historical as well as literary, it brought the story of the system from its earliest English inception down to its final entombment by the last Constitution of this State, and made an able plea for the restoration of the old magisterial system well guarded by appointment instead of election.

"An irridescent dream," an old lawyer muttered, as the Major concluded his address, "but a beautiful one."

"Lochaber no more," sighed another who knew the court in its halcyon days—"But is it impossible?"

Judge H. C. McDowell on the last day partially read probably the most valuable paper from a practical standpoint—"Some Misconceptions as to Federal Procedure," which we print in THE REGISTER in full. He was followed by Judge W. H. Taft in a forty minute address on "Reform in the Administration of Justice," which was naturally the feature of the occasion. He held that the "greatest question now before the American public is the improvement of the administration of justice, civil and criminal, both in the matter of the prompt dispatch and in the cheapening of the use" and urged that there should be a mandatory reduction of court costs and fees and a limitation in the number of appeals which would in the end "work for the benefit of the poor litigant and put him more on the equality of a wealthy opponent." He recommended also the settling of damage cases arising in interstate commerce by official arbitration under the federal law. Virginia lawyers could not but help smiling at the idea of reduction of costs in our State courts, where they have already been reduced to the extreme minimum, and the result of which reduction has operated more against the poor man than against any one else. As appeals under our laws are limited, this portion of the address had no application here. But, it was apparent Judge Taft's immediate concern was to federal procedure. Here the question of costs is a serious one, and may well encourage bar associations to devote some of their attention to well-considered proposals of reform both in the practice in those courts and in the ingenious methods by which the officers seem to be able, under strict legal right, to pile up a huge bill of costs.

Judge Taft's address was an exceedingly pleasant one both in its matter and manner. The suggestions were both timely and

valuable and delivered in a style which compelled admiration and respect.

No business whatever was transacted: The report of the committee on the English Practise Act, after a short, spicy and good-natured discussion, in which Hon. Roswell Page, of the Richmond Bar easily carried off the honors, was laid over till the next annual meeting. The lack of time in which to take up, discuss and transact any business is one of the great faults of the association. Few of the members care to sit after a long paper has been read, and listen to, or take part in the discussion of any business. The attractions of the Hot—the green grass on the lawns—and elsewhere—the charming society, the rides and the drives, the swimming pool, the Casino and links, are too attractive to admit of any long-drawn out sessions—and let us whisper it in your ear—two hours of steady and respectful attention even to the most entertaining address does not induce a disposition to take up any business matter, especially when the thermometer is in the eighties. We respectfully suggest to the Executive Committee that hereafter one day's session be devoted exclusively to business—there will be talk enough we anticipate even at that session—and that the association shall try to be a "doer" as well as a "hearer."

The Practise in the English Courts.

The very brief discussion on the report of the committee to recommend the adoption of the English practise in our courts brought out two facts, or rather expressions of opinion. One was that our present system was good enough and that no system, to use Mr. Hatton's expression, could be made "fool proof." The other was, that our courts were too technical in their ruling and that the fault in our system lay at their door.

We do not agree with either proposition. Our present system is a time consumer both in the amount of study required to learn it, which time might be far more advantageously spent in the study of other branches of the law, and in the time consumed in the preparation of papers—as well in the lengthy discussions which are heard at every term of the court upon questions of mere

pleading. "A fool proof" system can no more be devised in law than in life,

"The right to be a cussed fool,
Is safe from all devices human,"

but surely it is the height of folly to allow precious time to be wasted alike by the student and the practitioner, when the probability of error can be reduced to the minimum as is the result of the practise now in vogue in England. Arguments on pleadings have ceased to exist in the English courts: A certainty of issue, a prompt remedy for harmless mistakes—a celerity of trial, and a right of immediate amendment have been gained. Their courts no longer listen to quibbles over debt, assumpsit, trespass this or trespass that—duties too well known to need statement, need not be stated, misjoinder of actions in the same count do not trouble the judge—"Counts" are no longer "Countless." A sheet of legal cap would more than contain the longest statement of a claim. Justice swift and fresh needs no special pleading to be obtained. We hope in the coming year in THE REGISTER to give some instances of the working of the system. We believe, when it is understood, it will be appreciated, and in the end be adopted in this Commonwealth, where English blood and love of all good English things is still prevalent, and where yet more than in any other part of this continent the old, "English minds and manners may be found."

Justices of the Peace.

Major Conrad's delightful address on the old Virginia County Courts brought out some discussions as to the present standing of our county magistrates—not on the whole very flattering to that body of men, who, in the language of Cicero, were once termed "speaking laws." "Speak-easy laws," an irreverent young barrister said, when some one quoted the orator.

"If they could only mortgage their injustice as a pawn for their fidelity, said another, who had evidently been reading Burke, "our average county J. P.'s upon a foreclosure would exhibit an unheard of wealth." And thereupon were detailed instances from more than one section of the state which would have been comical

if they had not been pitiful. For these courts of the poor are often courts in which the rankest injustice is done to those who indeed have no helper and whose suffering is not to be estimated by the amount of their loss; for often the single or the five or ten dollar loss is far greater in proportion than the hundred or thousand is to the rich suitor.

One instance from a county noted for its wealth and intelligence: A negro boy was arrested for seduction. Haled before the magistrate, the father of the weeping damsel "allowed" that *he* was damaged $50.00 and proposed a compromise on that basis, which, being accepted, *a fine* for that amount and $5.00 costs was entered up, the fine to be for the benefit of the outraged parent and costs to be paid *instanter*. The boy's father was required to go security and judgment entered up against him and execution duly levied and paid in monthly installments.

Another from the same magistrate's quiver. A member of a beneficial fraternity claimed to be entitled to $20.00 for five weeks sick benefits—at $4.00 per. Having a doctor's certificate, the magistrates—three sitting in this case—refused to allow the introduction of parol testimony of the fact that four out of five weeks the plaintiff had been seen in his usual avocations. "You can't have no word of mouth testimony to impeach a writing," said the presiding justice, "in this Co't." And thereupon a *personal* judgment against three of the most substantial members of the Lodge was entered up for $9.90 and $3.00 costs. Of course they were informed that they could successfully resist this outrage, but on counting up the cost thought it best to pay up and shut up. The irony of the affair was, that one of the defendants had preceded the presiding magistrate in his office and had been noted for decisions of the same character;

*"Cosi s'osserva in me lo contrapasso"**

he might have murmured had he known his Dante, but like the illustrious Breitman "he opened his lips and briefly said d—n" when informed of his remedy and the cost thereof.

But seriously speaking could not some remedy be devised to make our magisterial system a better one. The fee system is responsible for much wrong and stirring up of strife. The elec-

*"Thus the law of retribution works in me."

tion of these officers is also to be deprecated. How would it do to have these petty judges appointed by the Circuit Judge out of three nominated to him by the electors in each district. Of course this means a constitutional amendment, but we will *soon* begin to amend that instrument. That something ought to be done seems apparent. Are there any suggestions?

Automobile Law.

The automobile cannot, even at its greatest speed, keep ahead of the law. And some of the decisions for which this valuable machine is responsible are almost as novel as the machine itself; despite the fact that the judges claim—and rightly claim—that there are no new inventions to which old principles of law cannot be made to apply.

In the case of Cunningham *v.* Castle a *nisi prius* judge in New York held that the owner of a motor car was responsible in damages to a person who was knocked down and injured by the car, which at the time was being run by a chauffeur to whom it had been loaned by the owner. The owner was not in the car and knew nothing of the accident.

The appellate division of the Supreme Court reversed the lower court, arguing that if a man lent his gamekeeper a shot gun and the gamekeeper negligently shot a man, the owner of the gun could not be held responsible.

And yet one of the appellate judges—Houghton—dissented and argued that the chauffeur was still engaged in his employer's business. He refused to recognize the employer's brief interval of unresponsibility. He contended that if the chauffeur had taken the machine without permission, then his act would have been entirely out of the scope of his employment. A new trial was however, ordered and unless the case goes up to the New York Court of Appeals—that state's final tribunal—the injured man must look to the chauffeur for damages. We are at a loss to understand how any other opinion could have been reached. But surely there ought to be some clear and coherent law governing the use of these machines and preventing their misuse in the hands of irresponsible parties.

Employers' Liability Act.

The case of Dewhurst *v.* Mather recently decided in the English Court of Appeals must prove a rather startling one to those who look upon our mother country as intensely conservative. Had Hon. A. C. Gordon known of this case when he read his paper on "Legal Foundations of Socialism" at the late meeting of the Bar Association, he might have added a pungent paragraph to his article.

Mrs. Dewhurst was a charwoman engaged in scrubbing work for Mrs. Mather and was held to be regularly in her employ. Whilst scrubbing a stairway, she pricked her thumb with a pin which was lying on one of the steps. Blood poisoning set in and she permanently lost the use of one hand.

She brought suit under the Workman's Compensation Act of 1906 and recovered damages which under the peculiar terms of the Act, were fixed at the sum of seven shillings (about $1.75) per week, payable as long as the plaintiff lives. The statute permits a judgment to be rendered for a fixed amount payable to the injured employee every week or month and for a period to be fixed by the court.

The most serious question presented, was whether Mrs. Dewhurst's employment was "regular" in the terms of the statute, for the statute only gives a remedy to servants in the "regular" employment of the master. Both the lower and upper courts held that Mrs. Dewhurst, who came at regular stated times to do her work, was a regular employee. This decision is "viewed with alarm" by the English press. The illustrated London News says anent the same:

> "The responsibility thrown upon householders as employers by the compensation act is a really terrible matter for people of moderate means; nor will it work out well for a very large number of the employed class. The thousands of casual male laborers who formerly got a living as window cleaners, jobbing gardeners and the like have been painfully affected by the act; employers now seek the services of men engaged by responsible companies or firms who can give a guarantee against claims for accident, and this means that only young, strong men can get work at all. Now the charwoman will have to be engaged under similar conditions and great misery will result to poor old women, for the Court of Appeals has

decided that if any person has engaged to go to work at a house one day in each week she is not a 'casual' but a 'regular' worker; and the consequence is that the person employing her must give her an annuity for life if any accident happens. In the case just decided, the charwoman pricked her thumb with a pin while scrubbing some steps, with the result that blood poisoning set in and she has lost the use of her hand. The married couple in whose house this happened are ordered to pay this casual worker seven shillings a week as long as she lives! It is therefore quite necessary for even the hard pressed tradesman's wife or the poorest housekeeper, if she employes any help in the rough work of the household, to take out a policy of insurance for the charwoman."

This view of the case is one seldom contemplated by the law-makers. In attempting to protect the laborer, more harm may be done to the class than help afforded the individual. The hard cases truly make bad laws in more ways than one. The claim for damages in this case seem to us to have been one which would never have prevailed in a Virginia court. It was certainly won by a "pin's point."

Commonwealth v. Richards.

The third trial of this case ended in August in the acquittal of the prisoner. The judge who retired from the bench during the last trial, became a witness for the defense to contradict some of the Commonwealth's witnesses. He had in the second trial refused to allow his notes taken in the first trial to be used to show contradictory statements of a Commonwealth's witness, and his ruling had been sustained in Richards *v.* Commonwealth, 107 Va. 881. His evidence therefore became necessary. We still fail to see any good reason why his notes should not have been used. He no doubt used those very notes to refresh his memory as to what was said.

In the case of Caton and Veale *v.* Lenox., 5 Rand. 31, Judge Carr quotes with approval, although as far as that case was concerned it was mere *obiter,* the opinion of Lord Mansfield in the case of Mayor of Dorcaster *v.* Day, 3 Taunt. 261, in which a new trial was given and counsel moved for a rule of court, that if any of the witnesses should die, or become unable to attend, their

evidences given on the former trial might be read on the next. Mansfield, C. J., said: "You do not want a rule of court for that purpose. What a witness since dead has sworn upon a trial between the same parties, may, without any order of the court, be given in evidence, either from the judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy." And Judge Carr adds: "This case seems to me to lay down the rule as broadly as any of the former. A judge's notes will furnish proof of the evidence." It seems to us that this case, although a civil one, might have safely been followed in the Richard's Case.

The American Bar Association and the English Practice Act.

The American Bar Association has, by a committee composed of eight distinguished lawyers and one distinguished professor of law, Roscoe Pound, recommended the adoption of the English Practice Act in the United States Courts. They say: "The reforms in civil procedure which we recommend have already been adopted in England, to the satisfaction of the Bar, and to the benefit of litigants. Any one examining the current English reports and comparing the dates of the transactions in controversy with the dates of decision, both of the courts of original jurisdiction and of the appellate courts, will perceive how much more expeditious, and on the whole more satisfactory, judicial procedure in England is than in the federal courts of this country and in many of the state courts. The abuses we complain of formerly existed in England. They have been corrected there, and if the American Bar should urge appropriate action in this country, we are satisfied that they can be corrected here."

The lawyers on the committee are Messrs. F. W. Lehmann, Everett P. Wheeler, Frank Irvine, Samuel C. Eastman, William E. Mikell, Henry D. Estabrook, Charles S. Hamlin and Charles B. Elliott.

But there is a minority report signed by a professor, James D. Andrews. It is quite evident to those who have studied the English Practice Act that the objections urged against the adoption of the report by Prof. Andrews are such only as could be urged

against any change in anything. He quotes Judge Dillon and the late Mr. Justice Miller as being in some way opposed to the English system of practice. If any one will take the trouble to look up his references it will be seen that they do not in any way touch upon this question.

As required by the rules of the Association, the report is accompanied by a series of bills designed to carry into effect the recommendations of the committee.

The report reaches the same conclusion as does the majority report made at the Hot Springs to the Virginia Bar Association on the adoption of the English Practice.

It is a matter deserving particular notice that no practicing lawyer has, after he has examined the Practice Act, opposed its adoption. The American Bar Association report says that the trial of a common law case is "a game, in which the man wins who plays it most skillfully, without regard to the merits of the controversy."

The litigants are first to be considered, as they pay their counsel, and we all together pay the judges, salary and court expenses, and the parties are entitled to a trial on the merits.

Lord Justice Bowen in the year 1887, speaking of the English Practice Act, said: "In every cause, whatever its character, every possible relief can be given with or without pleadings, with or without formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes—upon oral evidence or upon affidavits, as is most convenient. Every amendment can be made at all times and all stages in any record, pleading or proceeding that is requisite for the purpose of deciding the real matter in controversy. It may be asserted without fear of contradiction that it is not POSSIBLE in the year 1887 for an honest litigant in her majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." (Bowen: The Victorian Period—Vol. I, "Select Essays in Anglo-American Legal History," p. 541.)

Our Supreme Court of Appeals of Virginia in the case of Battershall *v.* Roberts, 107 Va. 271, 273, construing § 3385, a remedial statute of the Code of Virginia (1904), says: "It is perhaps well to call attention to the fact that more miscarriages, in the effort to bring the rulings of trial courts under review in this court, have occurred in the six years since the amended statute,

supra, has been in force, *than in all the years prior to its passage.* And why? Simply because the statute has not, in the cases where, the miscarriages have occurred, been strictly followed, as is absolutely necessary, in order to confer authority upon the judges of courts to sign a bill of exception, and make it a part of the record, after the adjournment of the term at which the final judgment in the cause is entered." The above case decided September 12th, 1907.

It is a cardinal principle of construction that statutes "Extending the right of appeal" and all other remedial statutes shall be "liberally construed." Bishop St. Con., §§ 120; 189d.

This particular remedial statute has been so *strictly* construed by the Supreme Court of Appeals of Virginia, that it will doubtless be necessary for the legislature to expressly provide by amendment that it shall be liberally construed.

When plaintiff and defendant have come to be pawns in a game, the hour for reform has struck.

S. S. P. PATTERSON.

Richmond, Va.,
Aug 20th 1908.

Buckram or Sheep for Binding Law Books.

The problem of binding is, or has been, a hard one for the law librarian to solve, but at the present time there seems to be a ray of light ahead.

At the second annual meeting of the American Association of Law Libraries, held at Asheville, N. C., May 24th-28th, 1907, a resolution was adopted requesting the publishers of the various reports, digests, statutes, etc., to bind a sufficient number of copies of their publication in the buckram or cloth binding to supply the libraries perferring that kind of binding. In accordance with this resolution, a committee on binding was appointed, and the report rendered at the third annual meeting, held at Minnetonka, Minn., June 22-27, 1908, is as follows:

The following reports can now be obtained in cloth binding: United States Circuit Court of Appeals Reports, United States Interstate Commerce Commission, United States Supreme Court

Reports, Alaska, Arkansas, California, California Appeals, Colorado, Connecticut, District of Columbia, Georgia, Georgia Appeals, Illinois, Illinois Appellate, Illinois Circuit, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, Law, New Jersey Equity, New York Appellate, New York Civil Procedure, New York Appeals, New York Criminal, New York Miscellaneous, North Carolina, Ohio State, Ohio Circuit, N. S.; Ohio Circuit, Ohio Nisi Pruis, Oregon, Pennsylvania, Pennsylvania Superior, Porto Rico, Texas, Texas Civil Appeals, Texas Criminal Appeals, Utah, Virginia, Wisconsin.

This report is very gratifying inasmuch as it shows that we can now continue 47 sets of reports in the buckram or cloth binding.

Publishers generally and the majority of law librarians have realized the superior qualities of the buckram binding, and the reason it has not been used more extensively by publishers is due to two causes. First: It is difficult to persuade the lawyer who has built up a library of sheep bound books to buy them bound in any other material. As a rule the young lawyers are more easily convinced.

The second objection is the various grades and colors of buckram that have been used. We can all go to our shelves and pick out books bound in light yellow, dark yellow, grey, brown and even red. What we need now is to have the publishers agree on a standard grade of buckram in a color that will correspond as nearly as possible with our sheep bound books.

The best sheep bound books rarely last over seven years, whereas the buckram bound books last indefinitely. Owing to the extremely large bills for rebinding which have been a continual drain on the law libraries during the last few years, the American Association of Law Libraries felt it their duty to take some action in this matter, and in inducing so many publishers to use the buckram binding they have conferred a favor not only upon all the law libraries, but upon the entire profession.

H. L. BUTLER,
Librarian.

American Law Library, New York City.